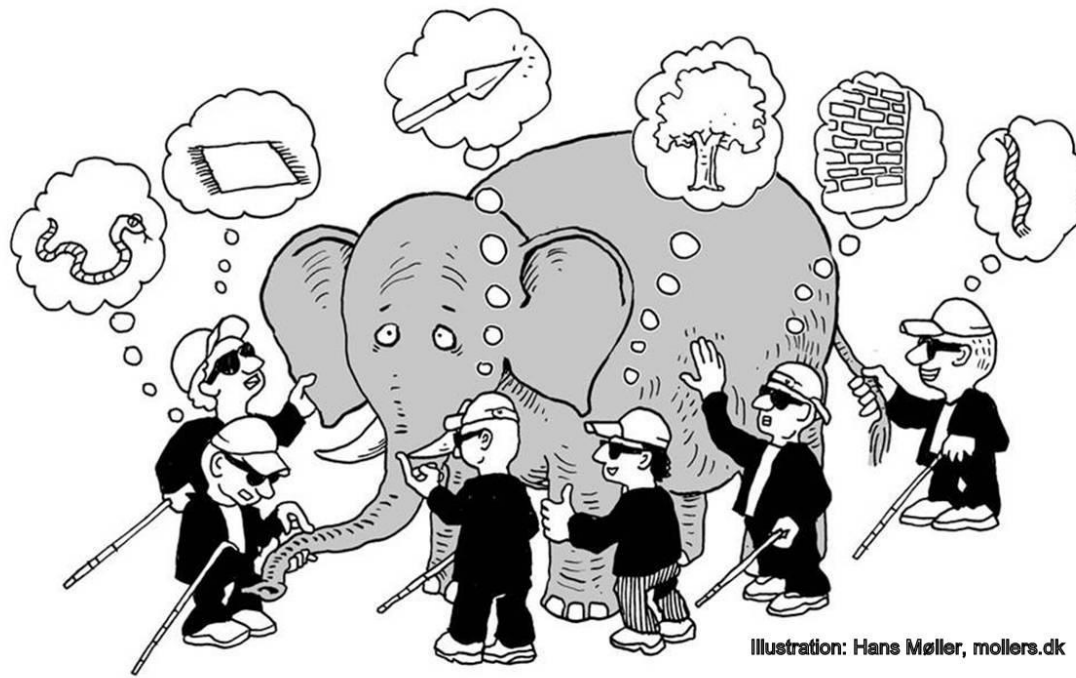


STATE SUPERVISION AFTER N.C. Dental Board v. FTC

Jack Nichols
Nichols, Choi & Lee, PLLC
Raleigh, NC
(919) 341-2636
jack@ncl-law.com



BLIND MEN EXAMINE AN ELEPHANT



DISCLAIMER

- * As a lawyer, I have opinions. As the lawyer who handled this case before the FTC, I have strong opinions.
- * BUT, the opinions here are my own, and not the N.C. Board of Dental Examiners, or any other client of Nichols, Choi, & Lee, PLLC.

SCOTUS DECISION

Justice Kennedy, speaking for the majority, said: “A non-sovereign actor controlled by active market participants – such as the Board – enjoys *Parker* immunity only if it satisfies two requirements:

- ‘the challenged restraint . . . [is] clearly articulated and affirmatively expressed as state policy,’
- and . . . ‘the policy . . . [is] actively supervised by the State.’

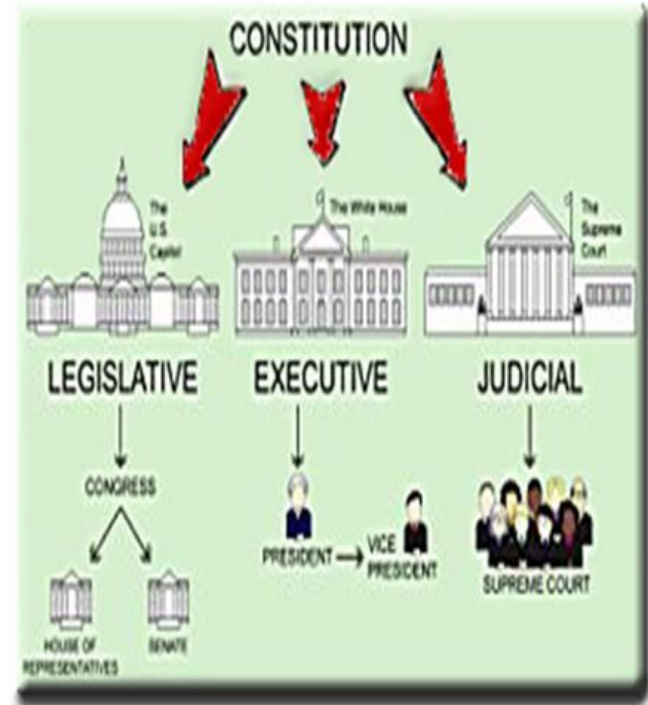
What is State Supervision?

- * Of course, the question becomes, what is “active supervision?”
- * Justice Kennedy left that matter open.
- * He stated, “Active supervision need not entail day-to-day involvement in an agency’s operations or micromanagement of its every decision. Rather the question is whether the State’s review mechanisms provide “realistic assurance” that the nonsovereign’s actor’s anticompetitive conduct “promotes state policy, rather than merely the party’s individual interests.”

What is State Supervision?

My view of State Supervision is to consider all 3 branches of government.

- ❖ Judicial Branch
- ❖ Executive Branch
- ❖ Legislative Branch



Current State Supervision by Executive Branch

- ❖ Governor's Appointment Power;
- ❖ N.C. Ethics Commission, in its review of Statements of Economic Interest and its investigation and prosecution of complaints; **also**, it has the ability to remove appointees;
- ❖ N.C. State Auditor's review of occupational licensing board (OLB) audits; and
- ❖ N.C. Rules Review Commission's review of OLB rulemaking and rules.

Current State Supervision by Judicial Branch

- I. Injunctive Relief for unlicensed practice;
- II. Criminal prosecution;
- III. Imposition of Civil Penalties, e.g. *N.C. Board of Barber Examiners v. Kindsgrab*
- IV. Judicial Review of:
 - A. Final Agency Decision; or
 - B. Declaratory Ruling, e.g. Alabama

Injunction as State Supervision by Judicial Branch

Most OLB statutes include a provision authorizing the Board to file a lawsuit and seek injunctive relief for unlicensed practice.

E.g., The N.C. Board of Architecture is empowered “... to institute ... suit in the Wake County superior court for a permanent injunction to restrain defendant from allegedly practicing architecture in violation of the provisions of G.S. 83-1(3) and 83-12.” *North Carolina Board of Architecture v. C. A. Lee*, 264 N.C. 602, 142 S.E.2d 643 (1965).

Criminal Prosecution as State Supervision by Judicial Branch

Most OLB statutes also include a provision authorizing the Board to ask a District Attorney to prosecute a criminal action for unlicensed practice. E.g., N.C.G.S. 83A-16(a). “Any individual or corporation not registered under this Chapter, who shall wrongfully use the title "Architect" or represent himself or herself to the public as an architect, or practice architecture as herein defined, or seek to avoid the provisions of this Chapter by the use of any other designation than "Architect": (i) **shall be guilty of a Class 2 misdemeanor;**

Criminal Prosecution as State Supervision by Judicial Branch

BUT, some Boards have a **felony** provision.

E.g., N.C. Board of Medicine, N.C.Gen.Stat. 90-18(a) provides: “Any person so practicing without being duly licensed and registered in this State and who is falsely representing himself or herself in a manner as being licensed or registered under this Article or any Article of this Chapter shall be guilty of a Class I felony.

Judicial Review as State Supervision by Judicial Branch

Imposition of Civil Penalties, e.g. *Kindsgrab v. N.C. Board of Barber Examiners*, N.C. Court of Appeals, NO. COA13-1321 (7 October 2014), PDR to NC Supreme Court denied on March 5, 2015.

“...in this case we hold that the imposition of civil penalties on non-licensees is reasonably necessary for the Board to serve its purpose of preventing non-licensees from engaging in the practice of barbering.”

Judicial Review as State Supervision by Judicial Branch



- ❖ Administrative Procedure Act (G.S. 150B- 43) allows Judicial Review of Final Agency Decision by a Licensing Board.
- ❖ “Any person aggrieved” may file a Petition for Judicial Review.

Dilemmas for State Supervision by Legislative Branch?

- ❖ Standing Committee of NCGA (like this one)
- ❖ Oversight of independent-minded licensing boards with varying functions:
 - Litigation?
 - Rule-making?
 - Other responsibilities?
- ❖ Organizational structure for oversight?
- ❖ Defining scope of practice for overlapping professions who are both licensed?

Questions?

